Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Jack R. Whitehorn,

Petitioner,

versus

Federal Communications Commission,
an Agency of the United States Government, and
DOES I through XX inclusive;
and ROES I through X inclusive,

Respondents.

On Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A *WRIT OF CERTIORARI*

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QUESTIONS PRESENTED

I. Is the legal memorandum judgment rendered by the Court of Appeals with error regarding the transfer of two radio licenses time-barred because the cause of action accrued more than two years before filing the instant action pursuant to 28 U.S.C. § 2401(b)?

II. Whether the Court of Appeals erred by their decision that the Federal Communications Commission's August 10, 2000 order, which **warned** petitioner herein not to file further pleadings against WFDR (AM) and WVFJ-FM failed to **demonstrate a deprivation** of liberty or property sufficient to implicate the **due process** clause (discussing liberty and property interests)? Moreover, was error asserted by the Court of Appeals' setting forth the 42 U.S.C. §§ 1983 and 1985 claims explaining Nevada's two year's personal injury statute of limitations claims while citing said FCC letter dated August 10, 2000? **Complaint by petitioner was filed May 22, 2002, within said two year period.**

III. **Does this instant case Court of Appeals' ruling differ from other lower court rulings?**

IV. **Has the United States Supreme Court issued any opinion(s) or reviewed a case like this litigation** involving unsettled questions of statutory law of general interest and/or federal constitutional questions?

V. Does the question as presented herein relating to U.S.C. 28 § 2401(b) regarding the word **OR** need a final directive from the United States Supreme Court concerning the issue of the statute? Further, would said final word from this Court settle the question requiring explicit issues involving requirements by statute and requirements by CFR, which may be in direct conflict and general importance for clarity of issues as set forth herein.

VI. Does a federal bankruptcy court order permanently restrain and enjoin a party before said court from instituting any proceeding concerning an FTCA claim before an administrative agency? Does the court injunction toll the FTCA time limitation?

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OPINIONS BELOW

There are two opinions of the United States Court of Appeals for the Ninth Circuit in the styled case as set forth on the cover. First, the Memorandum (filed May 14, 2003 9th Cir.); and Second, Rehearing and Rehearing *En Banc* (filed October 6, 2003).

The Order for the United States District Court, District of Nevada filed and entered October 31, 2002 concerning the instant case as well as the appellate court is unreported and set forth in the appendix hereto. (App. p. 7a)

The Complaint filed in the United States District Court is a part of the appendix in the spirit of completeness for the Court's convenience. (App. p. 23a)

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court of the District of Nevada was entered on October 6, 2003. (App. p. 5a)

The Petition for *Writ of Certiorari* is filed within ninety (90) days from that date; 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution. Amendment 5.

The quasi-judicial proceedings of an administrative tribunal must satisfy pertinent demands of due process.

Denial of a procedural right guaranteed by the Constitution, such as denial of a hearing guaranteed by the due process clause, is never harmless error.

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law.

The Federal Tort Claims Act

Title 28 U.S.C. § 2401(b) Two Year Time Limitation

Civil Rights Act – 42 U.S.C. Section 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The span of the case is lengthy. However, Federal Rules and Regulations of the Federal Communications Commission (FCC) must be adhered to, and in this matter, Bankruptcy Law was a mandatory factor. The FCC and bankruptcy cases had to be resolved and/or settled before any FTCA claims could be asserted.

The petitioner herein had to **recover** his **rights to valid FCC licenses** of two radio stations, **taken by** the **federal agency** from the petitioner. The radio stations, [*i.e.*, WFDR (AM) and WFDR (FM)] were taken by a third party and placed under bankruptcy protection pursuant to Title 11, Chapter 11 of the Bankruptcy Code. The third party never notified the FCC of any change in ownership before the taking, nor did they ever notify the FCC of any change in ownership.

The bankruptcy court sold the assets of said stations but the court did not try to take jurisdiction of the FCC proceedings. In fact, petitioner herein objected to sale of assets. The court overruled said objection. In the bankruptcy court's order entered on or about March 16, 1981, the court said: "**While the decision as to**

whether or not the sale does violate the rules of that body is not for this court." (Emphasis is added.)

But in the same order, the court held: "IT IS HEREBY ORDERED AND ADJUDICATED that all parties before this court and who have appeared in this proceeding are permanently restrained and enjoined from instituting any suit or proceeding before any court **or administrative agency** other than in this court and in proceedings on appeal from this order seeking to restrain or enjoin the closing of this sale authorized hereby." (Emphasis added.) By **filing or notifying** the **federal agency** on **August 14, 1981 through August 14, 1983,** as respondent stated is the accrual time, the petitioner would have been **in contempt of court**. However, petitioner had notified the federal agency before the said injunctive order.

Subsequent adversary proceedings and related suits were filed. On or about July 31, 1987, the bankruptcy court entered an order setting out "it thus appears that the order in the WFDR case did not affect Jack Whitehorn's property rights but only affects the pieces of paper representing such rights."

The **licenses,** (*i.e.*, property rights) had been **assigned** to a third party **without** any **hearing or due process** whatsoever **to petitioner** herein **by** the **federal agency** pending petitioner's recovery of his property rights in a court of competent jurisdiction, as stated in the agency's August 14, 1981 letter. After the agency's letter of August 14, 1981, the respondent **alleges accrual time started** and **expired on August 14, 1983**. (The allegation is not worthy to be considered as accrual time.) This is the **only time period argued as** the **time limitation period**.

At the time of July 31, 1987 order, the law was clear that the bankruptcy court had no jurisdiction over FCC authority to assign or transfer broadcast licenses. There is Black Letter Law that there is separation of license and facility, *i.e.*, license is not an asset of the bankruptcy estate. Ownership by petitioner herein of said licenses was eventually reached by settlement.

Now, there is **no question as to ownership of** said **property right**, *i.e.*, Petitioner Jack Whitehorn is owner of rights without doubt or controversy.

The complaint filed in the instant action is what petitioner believes is complete. The complaint is appended to this petition for this Court's information and evaluation.

The instant FTCA complaint was filed with the federal agency after all litigation was completed through the bankruptcy courts, as well as claims relating to bankruptcy court orders and final denial by the federal agency in accordance with all requirements to file an FTCA cause of action.

REASONS FOR GRANTING THE *WRIT* AND FACTS MATERIAL TO QUESTIONS PRESENTED

Petitioner herein Jack R.Whitehorn has met all requirements of 28 U.S.C. § 2401(b) concerning the time accrual. However, the District Court and the Court of Appeals for the Ninth Circuit, *inter alia*, differ from other courts' rulings. Accordingly, this is one factor for our petitioning this Court for issuance of a *writ of certiorari*.

The District Court dismissed petitioner's case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The petitioner has surmounted every issue the respondent has raised with the exception of questions presented for review -- *i.e.*, did the action accrue more than two years before filing a notice or notifying the federal agency? **This matter is the only disputed matter addressed by the Court of Appeals**.

Petitioner hereby **certifies** that **he did** in fact **present** the matter to said agency **within two years of accrual and** has shown and argued in the Court of Appeals that the federal agency **was noticed in writing** within two years of accrual. (Unquestionable documentation was submitted to the lower courts and on file with the federal agency.)

When does the statute of limitations start to run on Federal Tort Claims Act (FTCA) cases? This Court has said, *inter alia,* in *United States v. Kubrick*, 444 U.S. 111, S. Ct. 352, 62 L. Ed. 2d 259 (1979): "**There is nothing in the language or the legislative history of the Act that provides a substantial basis for the Court of Appeals' construction of the accrual language of 2401.**" (Emphasis added.)

We follow this Court's mandate, with other lower court's opinions for our petition for *writ of certiorari*. This Court in *Kubrick* further said: Title 28 U.S.C. 2674 provides in part: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." Title 28 U.S.C. 1346(b) provides that the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Title 28 U.S.C. 2401(b), the limitations provision applicable to tort claims against the United States, provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues **OR** unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." (Emphasis added.)

Additionally, the Court said: Title 28 U.S.C. 2675 (a) in pertinent part provides; "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless

the claimant **shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail**." (Emphasis added.) *Kubrick* did not file an administrative claim until after he filed his action in the District Court. This possible objection to his suite the District Court found moot when the VA denied the administrative claim on April 13, 1973. The United States did not pursue the issue on appeal.

The petitioner herein did in fact file his administrative claim, was denied in writing by certified mail, then within six (6) months after denial filed the instant action in federal district court. Petitioner completed all mandated precondition requirements *sine qua non* for filing his Federal Tort Claims action as set forth by this Court.

This Court continued: The 1966 amendment made the time of filing the administrative claim critical date for limitations purposes. But although the Reports indicate these changes with precision, **they do not further explicate when a tort claim "accrues" within the meaning of 28 U.S.C. 2401(b)**. S. Rep. No. 1327, 89th Cong., 2d Sess., 1, 5 (1966); H.R. Rep. No. 1532, 89th Cong., 2d Sess., 3, 8 (1966). (Emphasis added.)

The said *U.S. v. Kubrick* directives had no direct effect on petitioner's case before the lower court of appeals. The appeals court did not refer to this Court's opinion as a guideline. The Kubrick case is a medical case. The matter before the Court, petition for w*rit of certiorari*, is not medical, but is a case just as important as medical, that must be of as much general importance as to the effects of any litigant in FTCA cases. Pursuant to CFR § 114-100: "The date of accrual will depend on the facts of each case."

While it is absolutely necessary to file an administrative claim with the agency, *Spawr v. United States*, 796 F. 2d 279 (9th Cir. 1986) it is also important to make sure that the "sum certain" claimed is adequate to compensate the claimant for all injuries incurred; because if there is no administrative settlement and suit is

filed later, the amount that can be recovered in court will be limited to the amount claimed in the administrative claim, unless the plaintiff can establish that "the increased amount is based on newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. § 2675(b).

The instant claim here was filed within six (6) months after being denied by the agency. Said claim was submitted with Form 95 as required with sum certain.

At one point, pleadings were misplaced or lost by the federal agency. Petitioner was asked by said agency to resubmit filings due to lost documents. All federal agency requests were complied with on petitioner's part in good faith without any time requirements lapsing. Petitioner tried diligently to cooperate with the agency until the agency's final approval or denial. The agency file will so document. The claim was denied after lengthy floundering by the federal agency.

If tolling the limitations period was or is necessary in this instant matter, there is sound grounded authority for tolling the two-year limitations period concerning the instant case. Tolling was brought to the attention of the lower courts, but to no avail.

The Fifth Circuit has said: "The statute of limitations is tolled indefinitely until the agency denied the claim; see *McAllister v. U.S. by United States Dept of Agriculture*, 925 F. 2d 841 (5th Cir. 1991).

The Eighth Circuit agrees: In *Motley v. US*, 295 F. 3d 820 (8th Cir. 2002), the court held: "We apply the doctrine of equitable tolling to FTCA claims against the government; see *Nicolai v. US Bureau of Prisons*, Dir., 4 F. 3d 691, 693 (8th Cir. 1993).

The Third Circuit has said in *Hughes v. United States of America*, 263 F. 3d 272 (3rd Cir. 2001) with their opinion filed August 20, 2001:

> "Equitable tolling applicable to private defendants applies to suits against the United States. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). **Thus the FTCA's statute of limitations is not jurisdictional. Failure to comply with the statute is "an affirmative defense which the defendant has the burden of establishing**. See Fed. R. Civ. P. 8(c)." *Schmidt v. United States*, 933 F. 2d 639, 640 (8th Cir. 1991). Accord, *Oropallo v. United States*, 994 F. 2d 25, 29 n. 4 (1st Cir. 1993). In this procedural posture, it is the defendant's burden to establish the date when the plaintiff knew, or reasonably should have known, of the cause of his injury. (Emphasis added.)

The respondent herein has alleged the two-year statute was not followed and offered no sound documented evidence of the allegation other than simply stating the accrual time started with the FCC letter dated August 14, 1981 and expired August 14, 1983. This timeframe is an impossibility due to bankruptcy court injunction, supra. The respondent has never in any pleading mentioned the fact that the said letter stated *inter alia*:

> "Under the circumstances the Commission will not defer action on assignment or transfer applications pending final resolution of disputed claims. The Commission has neither the jurisdiction nor the machinery to adjudicate claims of the nature alleged by you. Such claims must be settled privately or in a court of competent jurisdiction using local law."

This statement without doubt demonstrates that the agency was timely notified of the taking of petitioner's licenses.

The petitioner herein followed the exact directive of the federal agency. Many years of expensive, extensive, complex litigation ensued to the point of victory for petitioner only to be

denied his rightful property by the federal agency without any hearing whatsoever. In short, the hearing guarantee of the due process clause of the Fifth Amendment accords to every person who claims injury or threat of injury an unconditional right to access to judicial or quasi-judicial tribunals; see *WJR, The Goodwill Station v. Federal Communications Commission*, 174 F. 2d 226.

This Court has held while a station license does not under the Act confer an unlimited or indefeasible property right, a broadcast license confers a private right although a limited and defeasible one, no license is construed to create any right beyond the terms, conditions, and periods of the license; see *Federal Communications Commission v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470 S. Ct. 693 84 L. Ed. 864; *Federal Communications Commission v. Pottsville Broadcasting Co.* 1940, 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed.

The said **licenses** were **valid at** the **time of taking** by the agency.

The petitioner filed the FTCA claim. Petitioner has proved the two-year statute was fully complied with, or in the alternative, certainly tolled.

The Tenth Circuit, just this year (2003), in *Robert N. Hoery v. US of America*, 324 F. 3d 1220 (10th Cir 4/11/2003) has held that Federal law governs the point at which a cause of action accrues under the FTCA. Moreover, in *Newcomb v. Ingle*, 827 F. 2d 675, 678 (10th Cir. 1987) ("federal law controls questions relating to accrual of federal causes of action"). For permanent torts, the claim accrues the later of when the injury first occurs or when the plaintiff learned or should have learned of his injury and its cause. See, e.g., *Kronisch v. United States*, 150 F. 3d 112, 121 (2d Cir. 1998); *Arvaya v. United States*, 766 F. 2d 1416, 1419 (10th Cir. 1985). **For continuing torts, however, the claim continues to accrue as long as tortious conduct continues**, although the plaintiff's recovery is limited by the statute of limitations to the two-year period dating back from when the plaintiff's complaint was filed. *United States v. Hess*, 194 F. 3d 1164, 1176-77 & n. 12 (10th Cir.

1999); **see also *Page v. United States*, 729 F. 2d 818, 821 & n. 23 (D.C. Cir. 1984) (limitations period begins to run as of the last tortious act alleged)**. (Emphasis added.) The appellant herein **has had no relief even though the adjudicated owner of the rights to stock which owns the licenses unlawfully taken by the agency**. In *United States v. Dickingson*, 67 S. Ct. 1382, the Court addresses the "taking" of property as a continuing process.

The Ninth Circuit, the appeals court in which we seek *writ of certiorari*, in *Nancy McGraw et al. v. United States of America*, 281 F.3d 997 (9th Cir. 2002) filed their opinion on February 25, 2002 wherein the court held: **Under the FTCA, a tort claim is barred unless the claimant notifies** "the appropriate Federal agency" "within two years after such claim accrues." 28 U.S.C. §§ 2401(b), 2675(a). (Emphasis added.)

Notification to the Federal Agency in the matter before this Court on petition for *writ of certiorari* is at Apex.

For the sake of *arguendo*, FTCA's statute of limitations is not jurisdictional and that failure to comply with it is merely an affirmative **defense that defendant has the burden of proving**; see *Schmidt v. United States*, 933 F. 2d 639, 640 (8th Cir. 1991) and *Slaaten v. United States*, 990 F. 2d 1038, 1043 n. 5 (8th Cir. 1993). One Panel of the Eighth Circuit cannot overrule an opinion filed by another Panel. Only the Eighth Circuit sitting en banc has the authority to overrule a Panel decision. See *Brown v. First Nat'l Bank in Lenox*, 844 F. 2d 580, 582 (8th Cir.) cert. dismissed 487 US 1260, 109 S. Ct. 20, 101 L. Ed 2d 971 (1988).

Without any doubt whatsoever, the FCC was notified of the taking of petitioner's licenses **within the two-year limitation period**. Subsequent litigation began and continued until every mode of a cause action was exhausted as required by law before filing a FTCA action.

The Eleventh Circuit (the court of appeals jurisdiction where the licensed radio stations are located) in *Boyd Burchfield v. United States of America, Dept. of Veterans Affairs*, 168 F. 3d 1252

(11th Cir. 1999) said: "A plaintiff bringing a claim against the United States under the FTCA **must first present the claim to the appropriate federal agency and wait for the agency to finally deny it**. An agency's failure to dispose of a claim within six months is deemed to be a final denial. See 28 U.S.C. § 2675(a). **A district court only has jurisdiction over an FTCA action if the plaintiff has met § 2675(a)'s requirements. See *Bush v. United States*, 703 F. 2d 491, 494 (11th Cir. 1983)**" (Emphasis added.)

Further the court has said: "We keep § 2675(a)'s underlying purpose in mind when considering the amount of information it requires from a potential litigant. **We have held that a claimant must give an administrative agency only enough information to allow the agency to "begin its own investigation" of the alleged events and explore the possibility of settlement. *Adams*, 615 F. 2d at 292. We do not require the claimant to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery, see *Brown v. United States*, 838 F. 2d 1157, 1160-61 (11th Cir. 1988), or every factual detail that might be relevant, see *Adams*, 615 F. 2d at 291-92. In short the amount of information required is minimal." *Id.* at 289**." (Emphasis added.)

The Fifth Circuit has held: "An administrative agency is deemed to be on notice not only of the theories of recovery stated in the claim, but of the theories of recovery that its reasonable investigation of the specific allegations of the claim should reveal; see *Rise v. United States*, 630 F. 2d 1068 (5th Cir. 1980)."

All of these things have been done by Petitioner Jack Whitehorn herein as set out, *supra.*

The court below relies on their precedent case, *Dyniewiez v. United States*, 742 F. 2d 484, 485 (9th Cir. 1984) (explaining that claimants must comply with both two-year and six-month limitations period).

The court states *inter alia*:

Section 2401(b) provides the statute of limitations for the Federal Tort Claims Act: A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues **OR** unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. (Emphasis added.)

Section 2401(b) establishes two jurisdictional hurdles both of which must be met. See *Claremont Aircraft, Inc. v. United States*, 420 F. 2d 896 (9th Cir. 1969); *Schuler v. United States*, 202 U.S. App. D.C. 199, 628 F. 2d 199 (D.C. Cir. 1980) (*en banc*) (*per curiam*). A claim must be filed with the agency within two years of the claim's accrual, and the claimant must file suit within six months of administrative denial of the claim. If either requirement is not met, suit will be time barred.

28 C.F.R § 14.9, captioned "final denial of claim," sets down the procedure for notifying claimants of the final administrative denial of their claims. Section 14.9 provides that the notification be in writing, sent to the claimant or his attorney, may include a statement of the reasons for the denial, and "shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than six months after the date of mailing of the notification."

Agencies are generally bound by the regulations they promulgate. *Confederated Tribes & Bands of the Yakima Indians v. FERC*, 734 F. 2d 776 (9th Cir. 1984) (*en banc*); the United States can, however, place procedural limitations on itself

> which are more intensive than the FTCA". See *Hall*, 660 F. 2d at 119.

Moreover, the lower court relied on *Taylor v. Regents of the Univ. of Cal*, 993, F. 2d 710 711-12 (9th Cir. 1993) regarding petitioner's 42 U.S.C. §§ 1983 and 1985 claims as time barred. The court in this case, *inter alia*, set forth:

> California's one-year statute of limitations for personal injury actions governs claims brought pursuant to 42. U.S.C. §§ 1981, 1983, and 1985. See *Wilson v. Garcia*, 471 U.S. 261, 275, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985), (state personal injury limitation statute governs § 1983 claims); *Del Percio v. Thornsley*, 877 F. 2d 785, 786 (9th Cir. 1989) (same); *McDougal v. County of Imperial*, 942 F. 2d 668, 672-74 (9th Cir. 1991) (state personal injury statute governs §§ 1981 and 1985 claims).

Petitioner's §§ 1983, 1985 claim was filed within Nevada's two-year limitations period.

Further, the lower court found:

> "Whitehorn's allegations pertaining to the FCC's August 10, 2000 order, which warned Whitehorn not to file further pleadings against WFDR(AM) and WVFJ (FM) fail to demonstrate a deprivation of liberty or property sufficient to implicate the due process clause. See, *e.g., W. Reserve Oil & Gas Co. v. NEW*, 765 F. 2d 1428, 1432 (9th Cir. 1985)."

The said case provides *inter alia* the following:

Civil Procedure>Appeals>Standards of Review>Standards Generally

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewable *de novo*. The review is limited to the contents of the complaint. To affirm this type of dismissal, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved. All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.

Petitioner has not been afforded due process opportunity to present his facts before the trial court.

Governments>Federal Government>Employees & Officials Constitutional Law>Civil Rights Enforcement>Immunity>Public Officials

The filing of an action against individual federal agents by a citizen is authorized where the citizen is suffering a compensable injury to a constitutionally protected interest. The court is required to dismiss a complaint unless it appears from the face of the complaint that the citizen has stated a cause of action which asserts a constitutionally protected right.

Is not due process a Constitutional right?

Constitutional Law>Substantive Due Process>Scope of Protection

To establish a cognizable property interest within the meaning of the due process clause of U.S. Const. amend. V, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Constitutional Law>Civil Rights Enforcement>Civil Rights Act of 1871>Coverage

Conduct by an individual acting under color of law which is designed to harass and embarrass does not constitute a denial of a cognizable "liberty" or "property" interest in a claim brought under 42 U.S.C.S. § 1983. Rather, such transgressions constitute nothing more than a tort which the state may protect against by virtue of its tort law.

Constitutional Law>Procedural Due Process>Scope of Protection

No hearing is required prior to the assessment or collection of taxes so long as the aggrieved party has adequate opportunity for later judicial determination of liability.

Governments>Federal Government>Employees & Officials Constitutional Law Civil Rights Enforcement>Immunity>Public Officials

A federal officer can be held liable for damages only if his constitutional torts knowingly were committed outside the scope of his statutory authority.

The agent for the federal agency, in writing dated August 10, 2000, set forth "Jack Whitehorn is **WARNED** not to file further pleadings against WFDR(AM) and WVFJ-FM, Manchester, Georgia, that may be deemed an abuse of process."

The Appeals Court in the order filed May 14, 2003 did not set forth any date of accrual.

The Rehearing and Rehearing *en banc* denial entered October 6, 2003 did not comment pursuant to "the accrual date in

the instant matter." Therefore, we look to the District Court's order entered October 31, 2002.

Again, there is no window of time the District Court sets out as to the accrual date, showing limitations had run two years from that date.

ALL THE COURT SAID WAS PLAINTIFF JUST DIDN'T FILE FTCA ACTION WITHIN LIMITATIONS PERIOD OF TWO YEARS.

A legal issue(s) merits a legal judgment.

The **respondent's argument is** at best a **manipulation of events** in the instant case that the **facts will not support.**

First, we look at the statute, Title 28 U.S.C §2401(b):

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues **OR** unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." (Emphasis added.)

> *Black's Law Dictionary* defines **OR** as follows:
> **Or**, *conj.* A disjunctive particle used **to express an alternative or to give a choice of one among two or more things**. It is also used to clarify what has already been said, and in some cases, means "in other words," "to-wit" or "that is to say." The word "or" is to be used as a function word to indicate an alternative between different or unlike things. In some usages, the word "or" creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, "or"

may be construed to mean "and." (Emphasis added.)

There has been no final word form this Honorable Court concerning the application of **OR** as set out in said U.S.C 2401(b). This is of general importance beyond the effects of this litigant.

Moreover, the petitioner herein has **unequivocally shown** that the **federal agency was noticed** even before the respondent alleges that statute of limitations began to run, *i.e.*, "letter from FCC dated August 14, 1981 and expired on August 14, 1983.

A legal issue that has been settled is very important to the cause of issuance of *writ of certiorari* the petitioner requests: **NO FTCA CLAIM CAN BE FILED UNTIL ALL ADMINISTRATIVE REMEDIES ARE EXHAUSTED,** *supra*. The accrual of the claim is a question of the law. See *Bradley v. United States by Veteran's Admin.*, 951 F. 2d 268 (10th Cir. 1991); *Osborn v. United States*, 918 F. 2d 724 (8th Cir. 1990); *Sexton v. United States*, 832 F. 2d 629 (D.C. Cir. 1987); *Zeleznik v. United States*, 770 F. 2d 20 (3d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *Portis v. United States*, 483 F. 2d 670 (4th Cir. 1973); *Tyminski v. United States*, 481 F. 2d 257 (3d Cir. 1973); *Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962); *Contra Tessier v. United States*, 269 F. 2d 305 (1st Cir. 1959).

Administration exhaustion is required under 28 § 2675(a). Most important, this Honorable Court in *William McNeil v. United States*, US S. Ct. 1980, 124 L. Ed. 2d 21, 61 U.S.L.W. 4468 (1993) sets forth: "The Federal Torts Claims Act (FTCA) provides that an 'action shall not be instituted upon a claim against the United States for money damages' unless the claimant has first exhausted his administrative remedies."

Petitioner herein believes that the questions presented, the facts material to said questions and this Court's precedents, opinions, as well as other courts of appeal that differ from the instant case ruling by the United States Court of Appeals for the

Ninth Circuit, unsettled questions of law and Constitutional questions merit the issuance of a *writ of certiorari*.

CONCLUSION

For all the reasons identified herein, a *writ of certiorari* should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and ultimately, to vacate and reverse the order below and remand the matter to the district court for trial.

Respectfully submitted this 2nd day of January 2004.

Jack R. Whitehorn

APPENDIX

FOR THE NINTH CIRCUIT

NO. 02-17383
CT/AG#: CV-02-00522-PMP

JACK R. WHITEHORN

Plaintiff – Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Defendant – Appellee

APPEAL FROM the United States District Court for the District of Nevada (Las Vegas).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Las Vegas) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 5/14/03

No. 02-17383

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 06 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JACK R. WHITEHORN,
Plaintiff-Appellant,

V

FEDERAL COMMUNICATIONS COMMISSION,
Defendant-Appellee.

DC# CV-02-00522-PMP
Nevada

ORDER

Before: PREGERSON, REINHARDT, and GRABER,
Circuit Judges

Whitehorn's motion for leave to file his petition for panel rehearing and rehearing en banc with attached exhibits is granted. The Clerk shall file the petition for rehearing received on June 30, 2003.

The panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P.35. The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

ENTERED AND SERVED OCT 31 2002
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JACK R. WHITEHORN
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION,
AN AGENCY OF THE
UNITED STATES GOVERNMENT;
AND DOES I THROUGH XX,INCLUSIVE; AND
ROES I THROUGH XX, INCLUSIVE,
Defendants.

CV-S-02-0522- PMP (RJJ)

ORDER

Presently before this Court is a Motion to Dismiss, or in the alternative, a Motion for Summary Judgment (Doc. #5) filed by Defendant Federal Communications Commission ("FCC") on August 15, 2002. Plaintiff Jack R. Whitehorn ("Whitehorn") filed an Opposition (Doe. #7) on August 30, 2002. Defendant FCC filed a Reply (Doe. #8) on September 13, 2002.

I. Background

Plaintiff Whitehorn claims he was formerly the rightful and sole owner of WFDR, Inc., the licensee of two radio stations. (Compl., Ex., Federal Communications Commission Complaint

[hereinafter "FCC Compl."] at 5.) Whitehorn further alleges that, bankruptcy proceedings for the company. (FCC Compl. at 4.)

Several facts are undisputed. On March 16, 1981, the United States Bankruptcy Court, Northern District of Georgia, overruled Whitehorn's objections to the sale of WFDR, Inc. (FCC Compl. at 5; Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss, or in the Alternative, Mot. for Summ. J. at 2.) On August 14, 1981, the FCC, acting pursuant to an approved reorganization plan, granted transfer of WFDR, Inc. and the two FCC licenses to another company. (FCC Compl. at 7; Def's Reply at 2.) On May 11, 2001, Whitehorn filed a complaint with the FCC. (FCC Compl; Def.'s Mot. to Dismiss, or in the Alternative, Mot. for Summ. J. [hereinafter Def.'s Mot."] at 3.) Through a letter dated October 12, 2001, the FCC announced its final decision to deny Whitehorn's claim for personal injury due to the transfer of WFDR, Inc.'s two licenses. (Pl.'s Opp'n to Def.'s Mot. to Dismiss, or in the Alternative, Mot. for Summ. J. [hereinafter "Pl.'s Opp'n] at 4; Def.'s Reply at 3.)

On April 10, 2002, Whitehorn filed his present Complaint with this Court alleging violations of the Federal Torts Claims Act ("FTCA"), 42 U.S.C. § 1983; and 42 U.S.C. § *1985.* (Compl. ¶ 2.) Whitehorn seeks compensatory damages, attorney's fees, litigation costs and any other relief this Court "may deem proper and just." (FCC Compl. at *25-26.)*

II. LEGAL STANDARD

A. Standard for Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss for tack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) may be described in one of two ways. *Thornhill Publishing Co., Inc. v.*

General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979) It maybe described as facial, meaning that it attacks the sufficiency of the allegations to support subject matter jurisdiction. Id. Or it maybe described as factual, meaning that it attacks] the existence of subject matter jurisdiction in fact." Id. Unless subject matter jurisdiction is affirmatively pled, the court will presume that it lacks subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 122k, 1225 (9th Cir. 1989) (citing *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979)).

When considering a "facial" attack made pursuant to Rule 12(b)(1), a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1988).

Unlike a "facial" attack, a "factual" attack made pursuant to Rule 12(b)(1) may be accompanied by extrinsic evidence. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987). The opposing party must then "present affidavits or any other evi-dence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair*, 880 F.2d at 201. When considering a factual attack on subject matter jurisdic-tion, "the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publishing Co.. Inc.*, 594 F.2d at 733). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill*

Publishing Co., Inc., 594 U.S. at 733 (quoting Mortensen v. First Fed. Say. & Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977)).

However, "[t]he relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction. . . where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine*, 704 F.2d at 1077). In such a case, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine*, 704 R2d at 1077 (citing *Thornhill*, 594 F.2d at 733-35). "In ruling on a jurisdictional motion involving factual issues which also go to the merits, the trial court should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional facts is akin to a decision on the merits." Id. (citing *Thornhill*, 594 F.2d at 733-34).

B. Standard for Federal Rule of Civil Procedure 12(b)(6)

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure7 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party," *Wyler Summit P'Ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, the court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. .See *Clegg v. Cult Awareness Network*, 12 18 F.3d 752, 754-5 5 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th 14 Cir. 1997) (citation omitted). "'The issue is not

whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" Id. (quoting *Scheuerv. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

The liberal rules of notice pleading set forth in the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts supporting his claim. See Fed. R. Civ. P. 8; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, __, 122 S. Ct. 992, 998 (2002). All the Rules require is "'a short and plain statement'" that adequately "'give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at ___, 122 5. Ct. at 998 (quoting Conley, 355 U.S. at 47). Therefore, a plaintiff merely must plead sufficiently to "establish a basis for judgment against the defendant." *Yarnaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997) (citations omitted). Further, a claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks for improper relief. *United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963).

III. DISCUSSION

Defendant FCC has moved to dismiss Whitehorn's Complaint on several grounds. For the reasons stated below, this Court will grant FCC's Motion to Dismiss.[1]

A. FTCA Claim

According to the Government, the United States is the only proper defendant in a suit brought pursuant to the FTCA. The Government contends that, because Whitehorn named the FCC rather than the United States, Whitehorn's FTCA claim should be dismissed. The Government also asserts that, because Whitehorn allegedly failed to provide actual notice of his FTCA claim to the United States Attorney and the United States Attorney General within the statutorily mandated period, Whitehorn cannot amend his Complaint so as to properly name the United States. (Def.'s Mot. at 8-9.) In addition, the Government maintains that Whitehorn's claim is barred because he did not comply with the FTCA requirement that he file his claim with the relevant administrative agency within two years of the claim's accrual. (Def.'s Mot. at 10-11.)

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[1] One of the arguments Whitehorn makes in his Opposition to the FCC's Motion to Dismiss involves the Notice of Intent to Take Default (Doc. #3) filed with the Court on July 5, 2002. In Whitehorn's Notice of Intent to Take Default, Whitehorn attempted to serve notice on the FCC that he intended to move for default judgment. (Notice of Intent to Take Default, at 2.) Whitehorn alludes to this intent in his Opposition to the present Motion. Whitehorn never formally moved this Court for default judgment. "Pro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d *565, 567* (9th Cir. 1986). As a result, Whitehorn's attempt to obtain a default judgment fails. Further, given this Court's disposition with respect to the statutes of limitations issues, Whitehorn's attempt to obtain a default judgment from this Court is moot.

Whitehorn argues that, by naming the Federal Communications Commission, an agency of the United States Government, as a defendant, he did in fact name the United States. Whitehorn also contends that he complied with the timely filing requirements of the FTCA.

The United States is the only proper defendant in a suit brought pursuant to the FTCA. *FDIC v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998); *Kennedy v. United States Postal Serv.*, 145 F. 3d 1077, 1078 (9th Cir. 1998). "A claim against [a federal agency] in its own name is not a claim against the United States." *Kennedy*, 145 F. 3d at 1078. Nor is an agency a proper defendant under the FTCA. *Craft*, 157 F. 3d at 706 (citing *Sheldon v. United States Customs Serv.*, 565 F.2d 1140, 1141 (9th Cir. 1977). Because Whitehorn failed to name the United States as the defendant for his FTCA claim, this Court must dismiss claim for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See Kennedy*, 145 F.3d at 1078; see also *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (explaining that the FTCA acts as a limited waiver of the United States' sovereign immunity in certain cases and that "[s]overeign immunity is jurisdictional in nature").[2]

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[2] Whitehorn also asserts that, because he is a *pro se* litigant, his claim should not be dismissed for mere failure to name the United States as the proper defendant. (Pl.'s Opp'n at 6.) In support of this argument, he cites a decision of the United States District Court, District of Columbia in which the court states that, "given the well established judicial policy of holding *pro se* complaints to less stringent standards in pleasing, it would seem harsh to dismiss the action on this basis." *Childress v. Northrop Corporation*, 618 F. Supp. 44, 48 (D.D.C. 1985) (citation omitted). Whitehorn fails to point out, however, that the *Childress* court would still have required the *pro se* plaintiff to seek leave to substitute the United States as a defendant." *Id.* As will be explained below operation of the applicable statute of limitation bars Whitehorn from substituting the United States as a defendant.

Ordinarily, a *pro se* litigant must be allowed to amend his Complaint so as to name the proper party: "Unless it is absolutely clear that no amendment can cure the defect . . . a *pro se* litigant is entitled to notice if [his] complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Department of Corrs.*, 66 F.3d 245, 248 (1995). Before the United States may be substituted as a party under Federal Rule of Civil Procedure 15, however, it must receive actual notice prior to the running of the applicable statute of limitations. *Allen v. Veterans Admin.*, 749 F.2d 1386, 1390 (9th Cir. 1984). "[A]ctual knowledge possessed by an agency will not be imputed to the United States." *Id.* (citing *Williams v. United States*, 711 F.2d 893, 898 (9th Cir. 1983)). Both the Attorney General and the United States Attorney must receive notice of the suit before the expiration of the statutory period. *Id.* at 1390 ("This is not an unreasonble [sic] rule, particularly consider-ing that Rule 4(d) of the Federal Rules of Civil Procedure requires service upon both the United States Attorney and the Attorney General whenever an agency is sued.")

Under 28 U.S.C. § 2401(b), a claimant has six months after final administrative denial in which to file a tort claim against the United States. The parties agree that, through a letter dated October 12, 2001, the FCC announced its final decision to deny Whitehorn's claim for personal injury allegedly incurred as a result of the transfer of WFDR, Inc.'s two licenses. (Pl.'s Opp'n at 4; Def.'s Mot. at 8.) The parties also agree that Whitehorn filed his Complaint on April 10, 2002 – within the statutory period. (Pl.'s Opp'n at 7; Def.'s Mot. at 8.) Whitehorn did not, however, serve notice on the Attorney General until April 26, 2003 – well after the expiration of the statutory period. (Pl.'s Opp'n at 9.) It also appears that Whitehorn did not serve notice on the United States Attorney until the much later date of July 23, 2002 (Doc. #4).) Because of Whitehorn's failure to provide the Attorney General and the United States Attorney with actual notice within the

statutory period, Whitehorn cannot now amend his Complaint so as to name the United States as a defendant. *Allen*, 749 F. 2d at 1388-90. White-horn's claim under the FTCA must therefore be dismissed without leave to amend.[3]

Whitehorn's claim also fails because of his failure to comply with the 28U.S.C. 2401(b) requirement that tort claims brought against the United States be "presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." In *Winter v. United States*, the 9th Circuit stated that "[a} claim accrues when a plaintiff knows that he has been injured and who has inflicted the injury." 244 F.3d 1088, 1090 (9th Cir. 2001) (citing *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979)). The parties agree that, on August 14, 1981, the FCC granted transfer of WFDR, Inc. and the two FCC licenses. (FCC Compl. at 7; Def.'s Reply at 2-3.) They also agree that Whitehorn received a letter notifying him of the transfer. (FCC Compl. at 7; Def.'s Reply at 2.) Almost twenty years passed before Whitehorn filed his administrative tort claim with the FCC on May 11, 2001. (FCC Compl. at 26; Def.'s Mot. at 10.) Because Whitehorn did not file his administrative tort claim with the FCC within the time allotted for such claims, his FTCA claim must be dismissed.[4]

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[3] Whitehorn alleges various constitutional tort claims based upon violations of the Fifth and Fourteenth Amendments of the United States Constitution. (Compl. at 3.) Because constitutional tort claims are not cognizable under the FTCA, these must be dismissed. *Meyers*, 510 U.S. at 477-78. The FTCA's jurisdictional grant, found at 28 U.S.C. § 1346(b), provides that the United States may be held liable "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Under § 1346(b), "'law of the place' means law of the State – the source of substantive liability under the FTCA. By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." *Meyer*, 510 U.S. at 478 (citation omitted).

[4] To the extent that Whitehorn's Complaint can be interpreted to allege that

B. 42 U.S.C. § 1983 Claim

According to the Government, Whitehorn's § 1983 claim must fail because he failed to allege that the FCC or its agents acted under color of state law and that the FCC's actions ultimately abridged rights created by the Constitution or federal statute. (Def.'s Mot. at 12.) The Government further contends that Whitehorn's § 1983 claim must be dismissed because he failed to file the claim within the applicable statutory period. (Def.'s Mot. at 11-12.)

Whitehorn asserts that "§ 1983 must be broadly construed" so as to encompass his due process violation claim against the FCC. (Pl.'s Opp'n at 14.) Whitehorn does not specifically address the Government's contention that he failed to file his § 1983 claim before the expiration of the applicable statute of limitations. Instead, Whitehorn appears to imply that his claims under the FTCA and § 1983 are controlled by the same statute of limitations and refers the Court to his earlier discussion of FTCA's filing requirements.

Section 1983 provides a cause of action against any person who acts under color of *state* law to abridge federal statutory of constitutional rights. *See generally* 42 U.S.C. § 1983. On the other hand, § 1983 does not provide a cause of action for actions taken

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the filing requirements of 28 U.S.C. § 2401(b) can be satisfied by *either* presenting the claim to the relevant agency within two years after it accrues *or* filing a claim in federal court within six months after final denial by the agency, Whitehorn's Complaint must be dismissed. (Pl.'s Opp'n at 6.) Both filing requirements must be satisfied before a federal district court can exercise jurisdiction over a claim brought pursuant to the FTCA. *Gibson v. U.S.*, 781 F.2d 1334, 1343 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987); *Dyniewicz v. U.S.*, 742 F.2d 484, 485 (1984).

under color of *federal* law. *Flamingo Indus. 9USA). Ltd. v. United States Postal Serv.*, 302 F.3d 985, 997 (9th Cir. 2002) (citing *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995)). Because the FCC acts under federal law, rather than state law, Whitehorn's allegations do not "establish a basis for judgment against the defendant." *Yamaguchi*, 109 F.3d at 1481. Whitehorn's § 1983 claim must be dismissed for lack of subject matter jurisdic-tion and the failure to state a claim upon which relief can be granted.[5] *See generally* Fed. R. Civ. P. 12 (b).

Whitehorn's § 1983 claim also fails because he did not file it until after the expiration of the applicable statute of limitations. Because § 1983 does not contain a statute of limitations, state law determines the length of the period during which a § 1983 claim may be filed. *Bagley v. CMC Real Estate Corp.*. 923 F.2d 758, 760 (9th Cir. 1991). Claims brought pursuant to § 1983 "are best characterized as personal injury actions" for purposes of a state's statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). In Nevada, the applicable statute is Nevada Revised Statute 11.190(4)(e), which allows two years for the filing of personal injury claims. *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989).

A § 1983 claims is said to arise when the claimant "'knows or has reason to know of the injury which is the basis of the action.'" *Bagley*, 923 F.2d at 760 (quoting *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986)). In letter to White-horn dated August 14, 1981, the FCC granted transfer of WFDR, Inc. and the two FCC licenses. (FCC Compl at 7.)

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[5] Whitehorn does not allege that FCC officials acted in concert with state officials so as to clothe themselves with the authority of state law. *See Billings*, 57 F.3d at 801. And, as explained below, the running of the statute of limitations bars Whitehorn from amending his Complaint so as to state such an allegation.

Plaintiff did not file his Complaint with this Court until April 10, 2002 – eighteen years after the expiration of the statutory period.[6] (Pl.'s Opp'n at 7.) Because Whitehorn did not file his § 1983 claim within the statutory period, the claim must be dismissed.[7]

C. 42 U.S.C. § 1985

Although Whitehorn alleges that the FCC acted in violation of 42 U.S.C. § 1985, he does not explain the nature of the alleged violation or indicate which subsection of § 1985 he wishes to take advantag [sic], his § 1985 claim must be dismissed because he failed to file his claim within two years of its accrual. The Government also argues that Whitehorn's § 1985 claim must be dismissed because he has failed to allege facts that would support a claim under any of § 1985's three subsections. The Government asserts that if Whitehorn intends that his claim be considered under § 1985(1), his claim must fail because he does not allege that he is a federal officer, or federal office holder, the class protected by § 1985(1). If Whitehorn intends that his claim be considered under § 1985(2), the Government asserts that Whitehorn's claim must be dismissed because he failed to allege that a "conspiracy hampered his ability to present an effective case in federal court." (Def.'s

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[6] Whitehorn does not allege a basis for tolling of the statute of limitations pursuant to Nev. Rev. Stat. 11.250.

[7] Whitehorn is also effective barred from seeking recharacterization of his claim as one brought pursuant to the United States Supreme Court's ruling in *Bivens v. Six Unknown Named Agents*, 403 U.W. 388 (1971). In *Van Strum v. Lawn*, 940 F.2d 406, 409-10 (9th Cir. 1991), the Ninth Circuit held that actions brought pursuant to *Bivens* should, like actions brought pursuant to § 1983, be subject to state statutes of limitation and, for that purpose, be treated as personal injury actions. Because White-horn did not file his claim within the two year period set by Nevada Revised Statute 11.190(4)(e), he cannot seek recharacterization of his claim.

Reply at 9.) As to § 1985(3), the Government maintains that Whitehorn's claim, if any, must be dismissed because he "failed to allege facts showing deprivation of his equal protection of the law, or deprivation of his equal privileges and immunities under the law which is motivated by racial, or other class-based, invidious discriminatory animus." (Def.'s Mot. at 15.) Whitehorn did not directly address this argument in his Opposition.

Whitehorn's allegations are insufficient to establish standing under § 1985(1). Section § [sic] 1985(1) afford protection only to federal officers and prospective federal officers. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 717 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981). Whitehorn does not allege that he is, or ever was, a member of that protected class, and "it appears beyond doubt that [Whitehorn]can prove no set of facts in support of his claim which would entitle him to relief" pursuant to § 1985(1). *See Conley*, 355 U.S. at 45-46. Thus Whitehorn's claims, if any, under § 1985(1) must be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See generally* Fed. R. Civ. P. 12(b).

Whitehorn's allegations are also insufficient to sustain a claim brought pursuant to § 1985(2). Section 1985(2) consists of two distinct parts. *Bagley*, 923 F.2d at 763; *see David v. United States*, 820 F.2d 1038, 1040 n.3 (9th Cir. 1987). The first part of § 1985(20 protects parties and witnesses from conspiracies to deter them from attending, or testifying in, court proceedings. 42 U.S.C. § 1985(2). It also affords similar protections to grand and petit jurors. 42 U.S.C. § 1985(2). In *Miller v. Glen & Helen Aircraft, Inc.*, the Ninth Circuit enumerated the elements that must be pled in order to sustain a claim brought pursuant to the first part of § 1985(2); "(1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in

injury to the plaintiff." 777 F.2d 496, 498 (9th Cir. 1985) (quoting *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2nd Cir. 1984)). In short, "a claimant must show that the conspiracy hampered the claimant's ability to present an effective case in federal court." *Rutledge v. Arizona Bd. of Regents*, 859 F.2d 732, 735 (9th Cir. 1988) (citing *David*, 820 F.2d at 1040; *Miller*, 777 F.2d at 498). Whitehorn does not allege that he has suffered, or imminently will suffer, an injury due to a conspiracy to hamper his ability to present an effective case in federal court. And his allegations do not "establish a basis for judgment against the defendant" pursuant to the first part of § 1985(2). *Yamaguchi*, 109 F.3d at 1481. Whitehorn does not have standing and this Court must dismiss his claim, if any, under the first part of § 1985(2) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. *See generally* Fed. R. Civ. P. 12(b).

"The second part of [§ 1985(2)] creates a federal right of action for damages against conspiracies which obstruct the due course of justice in any State or Territory with intent to deny equal protection." *Bagley*, 923 F.2d at 763. This part of § 1985(2) requires a showing of class-based or racial animus. *Id.* (quoting *Phillips v. Bridgeworkers Local 118*, 556 F.2d 939, 940-41 (9th Cir. 1977)). Because Whitehorn does not allege interference with state court proceedings, denial of equal protection, and class-based or racial animus, his allegations are insufficient to "establish a basis for judgment against the defendant." *Yamaguchi*, 109 F.3d at 1481. Whitehorn's claim, if any, under the second part of § 1985(2) must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See generally* Fed. R. Civ. P. 12(b).

Whitehorn's allegations are also insufficient to sustain a claim brought pursuant to § 1985(3). A plaintiff who brings suit pursuant to § 1985(3) must allege the following:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1537 (9th Cir. 1992) (quoting *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983)). In addition, the plaintiff must allege that the second element is "motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" *Id.* (quoting *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985)). "[C]onspiracies motivated by economic or commercial animus" are not cognizable under § 1985(3). *Scott*, 463 U.S. at 838. Whitehorn does not allege that he was deprived the equal protection of the laws due to racial animus. Nor does he allege that he is a member of a governmentally designated class that requires more exacting scrutiny or special protection. Therefore, Whitehorn's allegations do not "sufficiently establish a basis for judgment against the defendant." *Yamaguchi*, 109 F.3d at 1481. Whitehorn's claims under § 1985(3), if any, must be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See generally* Fed. R. Civ. P. 12(b).

Finally, Whitehorn's § 1985 claim fails because he did not file it within the applicable statute of limitations. Like suits brought pursuant to § 1983, suits brought pursuant to § 1985 are "charac-terized as personal injury actions and are governed by the same statute of limitations . . . ." *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991); *see Taylor v. Regents of the*

Univ. of Cal., 993 F.2d 710, 711-12 (9th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1994). In Nevada, the applicable statute is Nevada Revised Statute 11.190(4)(e) which allows two years for the filing of per-sonal injury claims. *Perez v. Seevers*, 869 F.2d 425, 426 (1989). In its letter to Whitehorn dated August 14, 1981, the FCC granted transfer of WFDR, Inc. and the two FCC licenses. (FCC Compl. at 7.) Plaintiff did not file his complaint with this Court until April 10, 2002; many years after the expiration of the statutory period. (Pl.'s Opp'n at 7.) Whitehorn does not allege a basis for tolling of the statute of limitations pursuant to Nevada Revised Statute 11.250. Because Whitehorn did not file his § 1985 claim within the two years allotted by statute, his claim must be dismissed.

IV CONCLUSION

IT IS THEREFORE ORDERED that Defendant Federal Communications Commission's Motion to Dismiss (Doc. #5) is hereby GRANTED.

DATED: October 29, 2002

Philip M. Pro
United States District Judge

Comp
Jack R. Whitehorn
5125 W. Reno Avenue, Suite 3-1004
Las Vegas, Nevada 89118
Telephone: 702-367-2102
Facsimile: 702-367-2283
Appearing *Pro Se*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JACK R. WHITEHORN,
Plaintiff,

vs.

THE FEDERAL COMMUNICATIONS COMMISSION,
AN AGENCY OF THE UNITED STATES GOVERNMENT;
AND DOES I THROUGH XX, INCLUSIVE; AND
ROES I THROUGH X INCLUSIVE,
Defendants.

CV-S-02-0522-PMP-RJJ

COMPLAINT
"Jury Demand"

TO THE HONORABLE JUDGE OF SAID COURT:

JACK R. WHITEHORN, plaintiff herein, files this his complaint against **THE FEDERAL COMMUNICATIONS COMMISSION, AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES I THROUGH XX, INCLUSIVE,**

AND ROES I THROUGH X, INCLUSIVE, and respectfully complains and shows the court the following:

I.
PARTIES

1. Jack R. Whitehorn is an individual and resides in Las Vegas, Clark County, Nevada.

2. The Federal Communications Commission (FCC) is an agency of the United States Government and may be served by process by serving the Secretary of said agency at 445 12th Street, SW, Room TW-A325, Washington, DC 20554; Managing Director Andrew S. Fishel, at 445 12th Street, SW, Washington, DC 20554; and the United States Attorney General at U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

II.
JURISDICTION

3. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C § 2671 – Tort Claims Act, 28 U.S.C. § 2401(b), 42 U.S.C. § 1983, and § 1985. The cause of action is a federal question. Venue lies in 28 U.S.C. § 1331.

III.
PREFACE TO ACTION

4. Pursuant to Rules of the FCC, the Complaint, under the United States Court of Federal Claims Act, was served upon said federal agency. Said agency denied claim. Accordingly, the Complaint is now being filed in this Honorable Court, seeking relief *inter alia*, deprivation, "invasion of property," "economic benefits and productive use of property," "affecting of property values without compensation," "due process and the takings clause,"

"protection of property under the Fifth and Fourteenth Amendments of the United States Constitution pursuant to Constitutional entitlements 'Private Nuisances.'"

5. Plaintiff realleges and reaffirms each and every allegation contained in paragraphs 1 through 4 as though set forth in full herein.

6. The Complaint as submitted to said FCC follows and is incorporated into this cause of action and made a part of this instant complaint.

Respectfully submitted this 10th day of April 2002.

Jack R. Whitehorn, Appearing *Pro Se*
5125 W. Reno Avenue, Suite 3-1004
Las Vegas, Nevada 89118-1585
Telephone No. 702-367-2102
Facsimile No. 702-367-2283

FEDERAL COMMUNICATIONS COMMISSI
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

October 12, 2001

VIA FACSIMILE: (702) 367-2283
and CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

Jack R. Whitehorn
5125 W. Reno Avenue
Suite 3-1004
Las Vegas, NV 89118-1585

Dear Mr. Whitehorn:

This is in response to the claim you submitted for personal injury in connection with the transfer of your radio licenses that occurred in or about 1981.

We have carefully reviewed your claim and the documentation submitted and find that it does not support recovery for the damages requested. We therefore deny the claim.

This constitutes a final denial of your claim. If you are dissatisfied with this determination, you may file suit in an appropriate U.S. District Court not later than six months after the date of mailing of this notification. ~ 28 U.S.C. § 2401(b).

Sincerely,
Andrew S. Fishel
Managing Director

CLAIM FOR DAMAGE, INJURY, OR DEATH

1. Submit To Appropriate Federal Agency.
The Federal Communications Commission
44512th Street, S.W.
Washington, DC 20554

Name, Address of claimant and claimant's
Jack R. Whitehorn
5125 W. Reno Avenue, Suite 3-1004
Las Vegas, NV 89118—1585

3 TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS
Disabled	5/19/35	M

8. Basis of Claim

See Complaint attached hereto and incorporated herein by reference.

9. PROPERTY DAMAGE

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED

See Complaint attached hereto and incorporated herein by reference.

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME INJURED PERSON OR DECEDENT

Complaint attached hereto and incorporated herein by reference.

11. WITNESSES

NAME

Public Record and Numerous individuals

12. AMOUNT OF CLAIM

12b~. PERSONAL INJURY $20,000,000

12d. TOTAL $20,000,000

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. Signature
Jack Whitehorn

13b. Phone number of signatory
702-367-2102

14. DATE OF CLAIM
11th day of May 2001

INSURANCE COVERAGE

15. Do you carry accident insurance?
NO

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?
NO/NA

17. If deductible, state amount
NA

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you ascertain these facts)
No claim filed/No insurance

19. Do you carry public liability and property damage insurance
No

Before the
Federal Communications Commission
Washington, D. C. 20554

JACK R. WHITEHORN
Plaintiff,

vs.

THE FEDERAL COMMUNICATIONS COMMISSION
Defendant.

COMPLAINT

COMES NOW **JACK R. WHITEHORN**, appearing *pro se*, and files this his complaint pursuant to Title 28, USC § 2671 – Tort Claims Act. The said complaint is supported by the Memorandum of Law attached hereto and incorporated herein by reference. The plaintiff herein is in full compliance with the administrative exhaustion requirements pursuant to 28 USC § 2675(a). A final order was issued by Defendant FCC dated August 10, 2000. Said order was appealed to the United States Court of Appeals for the District of Columbia, final adjudication entered March 16, 2001. The order is *res ipsa loquitur*. (Orders attached to instant complaint.) Under the said Act, the defendant agency has the right to admit or deny and pay or deny payment to plaintiff before judiciary process is invoked.

Respectfully submitted this 11th day of May 2001.

Jack Whitehorn, Plaintiff
Appearing *pro se*

5125 W. Reno Avenue, Suite 3-1004
Las Vegas, Nevada 89118
Telephone No. 702-367-2102
Fax No.: 702-367-2283

Before the
Federal Communications Commission
Washington, D. C. 20554

JACK R. WHITEHORN
Plaintiff,

vs.

THE FEDERAL COMMUNICATIONS COMMISSION
Defendant.

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S COMPLAINT

STATEMENT OF THE CASE

- A -

Factual Background

This complaint evolves from the serious illness of Plaintiff Jack Whitehorn and the avarice of blood-brother John F. Whitehorn, M.D. of Dallas, Texas (Dr. Whitehorn), Robert M. Garstin (Garstin), and Attorney Margaret H. Murphy (Murphy) of Atlanta, Georgia, and FCC Attorney Julian P. Freret (Freret) of Washington, D.C. and the Federal Communications Commission.

Plaintiff realizes that sympathy is an emotional concept, not a legal one. However, the court must be aware of the complete background and the thrust of the consuming ambitions that drive the misconduct, deceit and/or fraud in the actions perpetrated by and through the Defendant FCC in this instant matter.

Plaintiff Whitehorn became involved with Broadcasting Station WFDR, Manchester, Georgia (the subject matter of this instant case), January 1, 1958. Subsequently, plaintiff constructed

WFDR-FM. Over the ensuing years, plaintiff worked as vice president and general manager, buying stock from different stockholders until there were only two stockholders with 50 percent stock, *i.e.*, negative control. Plaintiff Whitehorn was one of the two stockholders.

In the mid 60s, a controversy between the two said stockholders could not be resolved. The president of the corporation (not Plaintiff Whitehorn) placed the business in bankruptcy. Plaintiff Whitehorn resisted, but to no avail. Whitehorn organized WFDR, Inc. (100 percent stock ownership), bought the assets and properly transferred the FCC licenses (WFDR-AM; WFDR-FM).

In February 1975, Plaintiff Whitehorn had a heart attack, was hospitalized and inactive most of the year. In 1976, he resumed work. In September 1977, he had heart surgery in Dallas, Texas. Dr. Whitehorn, plaintiff's blood brother, made all arrangements, *i.e.*, hospital, attending physicians, etc. Plaintiff, personally and through insurance, paid all cost for medical treatment. (Nothing was paid by Dr. Whitehorn.)

After returning to Georgia, Plaintiff Whitehorn was in an automobile accident requiring another 30-day hospital stay. Dr. Whitehorn came to Georgia, had conferences with case doctors and made suggestions for plaintiff's well being. (Is it any wonder that Plaintiff Whitehorn would sign any document for Dr. Whitehorn without reading? That is exactly what happened.)

After Plaintiff Whitehorn's relocation to Las Vegas, Nevada, the corporation's day-to-day operation was under the supervision of Vice President Fred McCurdy, Jr. (McCurdy is shown as vice president in Defendant FCC ownership files.) Plaintiff Whitehorn entered Valley Hospital in Las Vegas, March

19, 1980 with coronary pain. Plaintiff was released March 25, 1980.

There had been discussions, prior to that time, about a trust being set up for Plaintiff Whitehorn to be managed by Dr. Whitehorn.

On March 27, 1980 (two days out of hospital), Dr. Whitehorn's Dallas, Texas attorneys called, talked with plaintiff's wife, advising that papers would be in plaintiff's hands the next day, to sign said papers and return. Said papers were signed March 28, 1980 without reading. The document was not a trust, but instead, an option for the 100 percent stock of WFDR, Inc. owned by Plaintiff Whitehorn. No money was paid to Plaintiff Whitehorn for said option. No money has ever been paid by any party to Plaintiff Whitehorn for his life's work in said broadcasting business.

Evidentiary Facts Concerning WFDR, Inc. FCC Licenses (WFDR-AM; WFDR-FM)

After Plaintiff Whitehorn was well enough to comprehend the content of said document, Plaintiff Whitehorn retained Texas FCC Counsel J. Tullos Wells. (Document was based on Texas law.) Mr. Wells notified the FCC within 30 days of execution of document and of the existence of said document. (On file in defendant's records.)

Other counsel was retained by Plaintiff Whitehorn for representation in bankruptcy court. Long, hard, expensive litigation ensued.

Upon advice of FCC Counsel Wells, Plaintiff Whitehorn notified Garstin by mailgram on May 8, 1980 to remove himself from the corporate premises, that no authority existed for him to be

at WFDR, Inc. in any capacity. (Garstin was acting as Dr. Whitehorn's agent.) (On file in defendant's records.) From this date (May 8, 1980) there is no question, Garstin does not represent Plaintiff Whitehorn in any legal capacity

.

The next day, May 9, 1980 (unknown to Plaintiff Whitehorn) Garstin, proclaiming himself as president and sole director of WFDR, Inc., placed said corporation in a chapter 11 bankruptcy proceeding by filing a petition in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. The bankruptcy court subsequently upheld his authority to file said case.

At this point, Dr. Whitehorn nor Garstin had made any appearance before the FCC. Plaintiff Whitehorn is shown in the records of the FCC with 100 percent beneficial ownership of said corporation through the ownership report filed on October 27, 1978, relating to the renewal of licenses. Said ownership report set out Fred McCurdy, Jr. as vice president. (On file in defendant's records.)

THE SAID LICENSES WERE RENEWED AND VALID APRIL 1, 1979 TO APRIL 1, 1982.

On or about May 12, 1980, Plaintiff Whitehorn, not being aware of the said bankruptcy case communicated by letter to Washington FCC Lawyer Julian Freret. Freret responded May 16, 1980, setting out *inter alia*, that he did not represent Plaintiff Whitehorn individually. Said statement was a contrivance. Freret was, at this time, well aware of the value of said property. Freret had represented Plaintiff Whitehorn and WFDR, Inc. for many years.

On or about May 27, 1980, Garstin, with Freret's guidance, filed an application with the FCC for assignment of the corporate licenses from WFDR, Inc. to WFDR, Inc., debtor-in-possession. (On file in Defendant FCC's records.) A petition to deny was filed on behalf of Plaintiff Whitehorn. (On file in Defendant FCC's records.) The Commission granted assignment June 19, 1980 (On file in Defendant FCC's records.) Garstin was not authorized by Plaintiff Whitehorn to appear for WFDR, Inc., *supra*.

On or about October 15, 1980, the FCC received an ownership report as required in association with said assignment. The said ownership report was executed by Garstin on October 6, 1980, clearly showing no change in ownership, *i.e.*, **Plaintiff Jack Whitehorn, 100 percent owner of WFDR, Inc. stock**, *supra*. (On file in Defendant FCC's records.) Said ownership report in itself verifies Garstin has no authority of Plaintiff Whitehorn to appear before the FCC, *i.e.*, no change in ownership.

On or about March 16, 1981, Bankruptcy Judge W. H. Drake, Jr. ordered the property of WFDR, Inc. could be sold, and in a second March 16, 1981 order, Judge Drake overruled Plaintiff Whitehorn's objection to sale of the assets. The licenses are not an asset, *infra*. The March 16, 1981 order is important in this action wherein after Plaintiff Whitehorn's objection based on nonconformance of FCC rules and regulations was facilitated, Judge Drake clearly does not try to take jurisdiction of FCC proceedings. At page 5, paragraph 2, the court held:

> "The final objection to the sale is based on the premise that the sale violates the rules and regulations of the FCC. While the decision as to whether or not the sale does violate the rules of that body is not for this court." (Emphasis added.)

There has never been any other order issued/entered by the corporate bankruptcy court relating to bankruptcy court jurisdiction over FCC matters or ordering the FCC to take any action whatsoever.

On or about April 29, 1981, an application was filed with the FCC on behalf of the corporate assets purchaser, Watkins Associated Industries, 100 percent owner of Provident Broadcasting Company. The purchaser was seeking transfer of control of WFDR, Inc. from WFDR, Inc., debtor-in-possession, to Provident Broadcasting Company. (On file in Defendant FCC's records.)

It is apparent from Freret's cover letter dated July 16, 1981, that a Freret FCC crony advised that the said FCC application filed April 29, 1981 would not satisfy FCC requirements to transfer. (On file in Defendant FCC's records.) . Plaintiff Whitehorn has been unable to locate any written notification of FCC denial. Therefore, the said April 29, 1981 FCC application lay dormant until a scheme could be fabricated and implemented. Pursuant to 47 CFR § 73.3518, when an application for authorization in the radio broadcast service is pending and undecided, the applicant may not file any subsequent inconsistent or conflicting application or have any such application filed on its behalf.

An "Amended Plan of Reorganization" was quickly concocted by Murphy, Garstin, Freret and Provident and filed in the court on May 27, 1981. The court confirmed the said amended plan, June 29, 1981. (On file in Defendant FCC's records.)

Now, Murphy, Garstin and Freret must set into motion, the scheme so they could get their slice of the money available (*i.e.*, $790,000 purchase price for assets). The plot devised by Murphy and Freret (Garstin to follow their directions, Provident, a party) was a masterfully orchestrated fiasco by a big monolithic law firm,

along with FCC Attorney Freret and his FCC cohorts, to take the FCC licenses *i.e.*, the item of value, from the beneficial ownership of Plaintiff Whitehorn, transfer same by deception in total contempt for the entire legal mechanism.

As Judge Drake sets out in the order of July 31, 1987: The "Amended Plan of Reorganization" proposed in Articles IV and V to implement the orders approving the sale of assets by structuring the transaction in such a way that the outstanding stock of WFDR, Inc. would be canceled with prior holders of such stock receiving certificates of interest in the proceeds of the sale of newly issued stock to Provident. **THE AMENDED PLAN WAS CONDITIONAL UPON FCC APPROVAL.**

The FCC acquiesced and on August 14, 1981, granted transfer with letter of condition to Plaintiff Jack Whitehorn. (On file in Defendant FCC's records.) The bankruptcy court approved the date of August 18, 1981 as the effective date of the plan (six days after FCC approval of transfer). **The cancellation of Plaintiff Whitehorn's stock occurred after the FCC granted transfer of control.**

As Judge Drake sets out, Plaintiff Jack Whitehorn was ultimately decided as the 100 percent shareholder of WFDR, Inc., *i.e.*, owner of the Private Rights in the Items of Value, the FCC licenses.

PROOF OF OWNERSHIP IN SUPPORT OF THE INSTANT COMPLAINT

A comprehensive analysis of the argument herein exposes the tortious, fraudulent judgment of the Federal Communications Commission in connection with the order. The cycle of facts surrounded by bankruptcy law and communications law clearly

justify relief as Plaintiff Whitehorn requests. The pronounced facts as set out herein are:

- Plaintiff Whitehorn at all times, as shown in FCC records, was the owner of the Private Rights through 100 percent ownership of corporate stock, *i.e.*, Item of Value, the FCC licenses.
- As early as October 6, 1980, Garstin attested to said ownership by filing an ownership report setting out no change in ownership. There is no question, Jack Whitehorn was the legal owner of 100 percent of corporate stock of WFDR, Inc. preceding, during, and subsequent to the corporate bankruptcy proceeding. No legal authority exists for any party or entity to assign/transfer Jack Whitehorn's Private Rights.
- Judge Drake, in the July 31, 1987 order, set out "It thus appears that the orders in the WFDR case did not affect Jack Whitehorn's property rights but only affected the pieces of paper representing such rights."
- Both Communications and Bankruptcy Black Letter Law, at that time, is clear that the bankruptcy court had no jurisdiction over FCC authority to assign or transfer broadcast licenses.
- Plaintiff Whitehorn was deprived of his constitutional rights by the FCC's not allowing Whitehorn an opportunity to be heard in connection with the "taking" of his Private Right, *i.e.*, the FCC licenses rights as determined by the United States Court of

Appeals, District of Columbia Circuit in a precedent case.

- Robert Garstin, Margaret Murphy, Julian Freret and Provident Broadcasting Company did not have any authority to appear before the FCC in any capacity to remove Plaintiff Whitehorn's said Private Right.
- The FCC conspired with the said parties into assignment/ transfer of said Private Rights.
- There is a separation of license and facility. Black Letter Law.
- Garstin lacked any authority to appear before the FCC for Plaintiff Whitehorn to assign and/or transfer Whitehorn's Private Rights.
- The public interest, convenience and necessity certainly was not served in this action as set out *infra*.

COUNT 1. PLAINTIFF DENIED CONSTITUTIONAL RIGHTS BY DEFENDANT FCC, SOUNDING IN TORT

- A -

Corporate Stock or Certificates of Interest Germane to the FCC Licenses

In United States of America v. Evans, 375 F.2d 730 (9th Cir. 1967) the court held: "Stock" in a corporation is an equity and it represents an ownership interest.

Judge Drake found in the July 31, 1987 order submitted to the FCC in support of the "Petition for Revocation":

> "It thus appears that the orders in the WFDR case did not affect Jack Whitehorn's property rights but only affected the pieces of paper representing such

> rights -- *i.e.*, the stock certificates which were canceled and replaced by certificates of interest in the sale proceeds."

The certificates of interest gave Plaintiff Jack Whitehorn the same "bundle of rights" as the actual stock certificates although Plaintiff Whitehorn still had actual stock certificates at the time of the "taking" of the FCC licenses, i.e., the Item of Value. The Item of Value (FCC licenses) was not altered by the mere change in the physical pieces of paper representing the value. Plaintiff Jack Whitehorn holds the same bundle of rights prepetition corporate bankruptcy, the same bundle of rights prior to the confirmation of the WFDR Amended Plan and the same bundle of rights subsequent to confirmation and consummation of the Amended Plan. See *Evans v. Stockton & Hing (In re Southwest Restaurant System)*, 607 F 2d 1243 (9th Cir. 1979), cert. denied, 444 U.S. 1081 (1980). "Items of value" are well defined in said case. Further, bankruptcy proceedings are subject to the Fifth Amendment; *United States v. Security Indus. Bank*, 459 U.S. 70, 75 103 S.Ct. 407, 410, 74 L.Ed. 2d 235 (1982). As a general proposition, even Congress is not free to give away constitutional rights.

There is no question of the ownership position that Plaintiff Whitehorn litigated years to sustain. Said ownership was reached by "**settlement**" as set out in Judge Drake's order entered July 31, 1987. The said order on petition for writ of certiorari by this plaintiff was affirmed by the United States Supreme Court by denying certiorari, Case No. 88-647 --U.S.--, 109 S.Ct. 567, 102 L.Ed. 592 (1988).

The "true owner" of a "Private Right," Item of Value/property, should not be bound by the efforts of another who may lack any genuine interest in the dispute such as Murphy, Garstin and Freret. See *Dull v. Backman*, 1898, S.Ct. 333, 335, 169

U.S. 243, 248, 42 L.Ed. 733; *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). Murphy, Garstin nor Freret owned any beneficial interest in the FCC licenses ("Items of Value").

The FCC licenses are not an asset of the corporate bankruptcy estate pursuant to Bankruptcy Black Letter Law in that time period. See *In re D. H. Overmyer Telecasting Co. Inc.*, 35 B.R. 400 (Bkrtcy 1983). Title 47 § 303 provides: The power to license a radio station or to transfer, assign or annul such licenses is within the exclusive jurisdiction of the Commission; see *Johnson v. Radio Station WOW*, 1944, 14 N.W. 2d 666, 144 Neb 406 reversed on other grounds 65 S.Ct. 1475, 326 U.S. 120, 89 L.Ed 2092, mandate confirmed to 19 N.W. 2d 853, 146 Neb 429, motion denied 66 S.Ct. 11, 326 U.S. 804, 7 L Ed 2d 489.

- B -

The FCC Licenses Germane to Corporate Stock or Certificates of Interest

Plaintiff Whitehorn has never received any notice or legal service from the FCC or any party involved in the "taking," *i.e.*, assignment/transfer of WFDR AM-FM licenses. Plaintiff Whitehorn's only knowledge was from seeing a report of application for said transfer of control in a Broadcast trade publication. The Federal Communications Commission is not, strictly, a court but it has quasi-judicial powers and its proceedings must satisfy the pertinent demands of due process; Title 47 U.S.C. § 151 *et seq*; see *National Broadcasting Co. v. U.S., N.Y.*, 1943, 63 S.Ct. 997, 319 U.S. 190, 87 L.Ed 1334; *L.B. Wilson Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793. Parties whose rights are to be affected are entitled to be heard, it is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner"; see *Armstrong v.*

Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187,1191, 14 L.Ed. 2d 62. (Emphasis added.) Plaintiff Jack Whitehorn, the owner of record, was not noticed, *i.e.*, never provided a right to be heard at anytime by the FCC.

The quasi-judicial proceeding of an administrative tribunal must satisfy pertinent demands of due process, U.S.C.A. Constitutional Amendment 5. Further, every person who claims injury or threat of injury has a right under due process clause of Fifth Amendment, to contend before an appropriate tribunal that within the allegations of his claim, assuming their truth, he states a cause of action cognizable under the rules, principals, concepts or standards of law which the tribunal is empowered to apply, U.S.C.A. Constitutional Amendment 5. See *WJR, The Goodwill Station v. FCC*, App. Ct. D.C. 174 F.2d 226.

A compelling line of reasoning in this instant action, considering that Murphy, Garstin and Freret did not own any right in the licenses, is Title 47 § 310 which sets out: The FCC is precluded from considering a third party as competing applicant for assignment . . . upon application to transfer permit if the permit continues to be valid; see *MG-TV Broadcasting Co. v. F.C.C.*, 1968 408 F 2d 1257, 133 U.S. App. D.C. 54. The subject broadcast licenses were "valid" at time of "taking."

This court has determined a "Private Right" in "thing of value" in *L. B. Wilson Inc. v. FCC*, U. S. App. D.C. 176, 170 F.2d 793. This court held:

> "While a station license does not under the act confer an unlimited or indefeasible property right (*Federal Communications Commission v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, 60 S.Ct. 693 84 L.Ed. 864) -- the right is limited in time and

quality by the terms of the license and is subject to suspension, modification or revocation in the public interest -- nevertheless the right under a license for a definite term to conduct a broadcasting business requiring -- as it does -- substantial investment is more than a mere privilege or gratuity. **A broadcasting license is a thing of value to the persons to whom it is issued and a business conducted under it may be the subject of injury.** We set forth in the margin, quotations from decisions of the Supreme Court which supports these statements and also provisions of the Communications Act itself which recognize that **a broadcast license confers a private right, although a limited and defeasible one**. (Emphasis added.)

Margin Quotations: In *Federal Communications Commission v. Pottsville Broadcasting Co.*, 1940, 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656, the court recognizes at various points in its opinion the existence of a private right or interest in a station licensee while his license is outstanding. The court states (referring to Sections 307(d) and 301 of the statute): 'No license was to be construed to create any right beyond the terms, conditions, and periods of the license.'" (Emphasis added.)

The said licenses' "Private Right" was valid April 1, 1979 to April 1, 1982 -- **the "taking" process was acted on by the FCC August 14, 1981.**

COUNT 2. THE PROCESS OF "TAKING" THE FCC LICENSES FROM PLAINTIFF, SOUNDING IN TORT

1.

Plaintiff Jack Whitehorn, not being informed of any proceeding in the "taking," assignment/transfer of control of licenses of WFDR AM-FM, has assembled copies from FCC files. He has, in the course of the affair, determined *prima facie* the underhanded scheme perpetrated in the said "taking."

2.

On or about April 28, 1981, the FCC received applications and assigned file numbers BTC810428HV and BTCH810428HW for consent to transfer control of corporation holding radio broadcast station construction permit or licenses. Said application was submitted on FCC Form 315. (On file in Defendant FCC's records.) The application was submitted by attorneys for Watkins Associated Industries, Inc., 100 percent owner of Provident Broadcasting Company, transferee. The transferor was WFDR, Inc. debtor-in-possession, with Garstin acting as president and executing application, and Freret to receive all communications concerning application. The application sets forth transferor's reason for requesting the said transfer of control: "To comply with order of U. S. Bankruptcy Court resolving proceeding before it."

Further, in response to question 9, Is transferor a party to any other suit or proceeding which may be affected by the proposed transfer of control, the answer was stated:

> "Sale is pursuant to chapter 11 proceeding before U.S. Bankruptcy Court. See Appendix 2."
> The said Appendix 2 asserts:

"As the Commission is aware, Stations WFDR and WFDR-FM, located in Manchester, Georgia, and licensed to WFDR, Inc., are operating under the control of WFDR, Inc., Debtor-in-Possession, which in turn is subject to the control and supervision of U.S. Bankruptcy Court, Northern District of Georgia, Newnan Division pending resolution of bankruptcy proceedings before that Court. (See BAL-800527HW and BAL-800527HV, granted June 19, 1980.)

On March 16, 1981, the Court entered an Order approving a transfer of control of the licensees to Provident Broadcasting Company, the proposed transferee herein subject to Commission consent; reconsideration of amendment of the Court's Orders and a request for a new trial were denied by Court Order entered April 9, 1981. See Attachments A, B, and C.)*

Upon authorization by the Commission, the proposed transfer will be effectuated by a corporate reorganization carried out by the Court, whereby all of the presently issued and outstanding stock of WFDR, Inc. will be cancelled and entirely new shares will be issued to Provident Broadcasting Co. Provident Broadcasting Co. will pay $790,000 to the Court for this stock, which sum will be distributed to WFDR, Inc.'s creditors in discharge

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* The Court's Order refers to a transfer to the Lake George Corporation. As permitted by the Court, the rights of Lake George Corp. were assigned to Provident Broadcasting Co. (See Attachment D.)

> of their claims, with any residue to be received by WFDR, Inc.'s former shareholders.
>
> It may be noted that, as reflected in the Court's order, the Court's resolution of the bankruptcy proceeding before it was opposed by Jack Whitehorn as creditor and shareholder of WFDR, Inc. As also shown by the Court's Order, the Court has rejected Mr. Whitehorn's opposition, holding, *inter alia*, that it has properly assumed jurisdiction over all property of WFDR, Inc., and that, pursuant to such jurisdiction, it has appropriately exercised supervision and control over the property of the licensee via the debtor-in-possession and authorized sale of the licensee to Provident Broadcasting Co. Thus, as indicated by the Court's Order, as well as the Commission's June 19, 1980 grant of the licensee's FCC Form 316 transfer application it is the debtor-in-possession under the control of the U.S. Bankruptcy Court which is the transferor in this application."

A summary analysis of said Appendix validates the deficiency therein, *i.e.*, in the second paragraph, the document sets out on March 16, 1981, the court entered an order approving a transfer of control of the license to Provident Broadcasting Company. The proposed transfer was subject to Commission consent.

This is a total mischaracterization of the order. (On file in Defendant FCC's records.) Further the court had no jurisdiction to make any order with reference to the FCC. Title 47 § 301 recognizes the private interest of licensees. See *L. B. Wilson, Inc. v. FCC*, *supra*. The power to license a radio station or to transfer,

assign or annul such license is within the exclusive jurisdiction of the Commission. *Johnson v. Radio Station WOW*, 1944, 14 N.W. 2d 666, 144 Neb. 406, reversed on other grounds 65 S.Ct. 1475, 326 U.S. 120, 89 L.Ed. 2092, mandate conformed to 19 N.W. 2d 853, 146 Neb. 429, motion denied 66 S.Ct. 11, 326 U.S. 804, 7 L.Ed. 2d 489.

At this point the group planned to seize the "Item of Value" by simply doing away with Plaintiff Whitehorn's stock or canceling the outstanding stock of WFDR, Inc., period -- then, selling new stock. Of course, this is as ridiculous as the expression of purpose.

Moreover, the fourth paragraph sets out: Shareholder and plaintiff herein, Jack Whitehorn tried without success to advise all parties from start of controversy that ownership of said stock must be determined before transfer of control of license could proceed. Further, the document sets out: The court assumed jurisdiction over all property of WFDR, Inc. and that pursuant to such jurisdiction, the court has appropriately exercised supervision and control over the property of the licensee **via** the debtor-in-possession **and authorized sale of the licenses to Provident Broadcasting Company**. The FCC licenses are not property of the corporate debtor, not property of the corporate estate; *In re Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bkrtcy 1983).

The said application was without merit.

The said application further included the alleged consent to action by the sole director of WFDR, Inc., Robert M. Garstin. The said resolution is as follows:

> The undersigned, being the sole Director of WFDR, Inc., a Georgia corporation (the "Company"), by affixing his signature hereto, does hereby consent to and take the following action and adopt the

following resolution in accordance with the applicable provisions of Section 22-710 of the Georgia Business Corporation Code.

IT APPEARING TO BE in the best interests of the Company to accept, subject to approval of the United States Bankruptcy Court, an offer from Lake George Corporation to purchase all of the assets of the Company for $790,000.00 and other good and valuable consideration and to authorize the President and Secretary of the Company to execute an Agreement of Sale with Lake George Corporation, the following resolution is hereby adopted:

> RESOLVED, that the proposed Agreement with Lake George Corporation under which Lake George Corporation has offered, subject to approval of the U. S. Bankruptcy Court, to purchase all of the assets of the Company be and it hereby is accepted and that the President of the Company, Robert M. Garstin, and the Secretary of the Company, Charlotte Zubowitz, be and they hereby are authorized to execute and deliver said Agreement, subject to approval of the U. S. Bankruptcy Court, and to take all actions and do all things as may be necessary as to consummate the sale of all of the assets of the

Company to Lake George Corporation.

Said resolution was to sell **ASSETS** of the corporation. The licenses are not an asset of corporation or corporate estate *supra.*

Debtor-in-possession is defined in 11 U.S.C. § 101(12)(13). Present law sets out a change in terminology from the 1981 law. Debtor-in-possession in general, as WFDR, Inc. debtor-in-possession was defined as a company, corporation, or individual continuing to operate the business under the protection of the bankruptcy court. After rehabilitation and court dismissal, the entity returned to name caption as WFDR, Inc., deleting the "debtor-in-possession."

On June 19, 1980, the FCC granted "involuntary assignment" from WFDR, Inc. to WFDR, Inc., debtor-in-possession, *supra*.

On July 16, 1981, the "taking scheme" reached its apex by Freret's filing on behalf of WFDR, Inc., debtor-in-possession, FCC Short Form 316 for involuntary assignment of licenses from WFDR, Inc., debtor-in-possession, and return to WFDR, Inc. *i.e.*, removing the bankruptcy court from jurisdiction over the property *i.e.*, assets not FCC licenses. (Plaintiff Jack Whitehorn was 100 percent owner of "Private Right in Item of Value," the FCC licenses.) (On file in Defendant FCC's records.) Assignment applications are subject to the same standards and treated in the same manner as initial license applications **unless they do not entail a substantial change in ownership or control**; see *Citizens Committee to Save WEFM v. FCC,* 1974 506 F.2d 246, 165 US App D.C. 185. (Emphasis added.) Plaintiff Jack Whitehorn was still shown in FCC records as 100 percent owner of said "Item of Value," therefore, the said FCC Short Form 316 could be used.

The Commission must consider matters in its own files which indicate that the public interest is affected by a particular application or proceeding, even though the petition or objection is not technically sufficient to raise the issue. See *Retail Store Employees Union, etc. v. FCC*, 141 App. D.C. 94, 436 F 2d 248.

Murphy, Garstin, Freret, Provident Broadcasting Company, and the Federal Communications Commission contrived a calculated strategy and perpetrated the shameless shenanigans upon plaintiff herein while "taking" the beneficial ownership ("an Item of Value"), the FCC licenses. It is well established that temporary takings are as protected by the constitution as are permanent ones. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

Freret's cover letter, filed with the said FCC 316 Short Form application for assignment, sets the credibility of the character of the filing with the FCC. (See letter on file in Defendant FCC's records.)

The scope of said cover letter sets out the involuntary assignment of WFDR, Inc. to WFDR, Inc., debtor-in-possession, *supra* and is the present licensee. The letter refers to pending transfer of control application Form 315 awaiting action by the FCC, *i.e.*, lying dormant as discussed herein *supra*. The letter continues:

> "In accord with most helpful suggestions by a member of the Commission's staff."

This appears to be Freret's cohort, Stuart Bedell, Esquire, as said letter is directed to his attention. Freret's letter continues:

> "An opinion letter from bankruptcy counsel in Georgia affirms the purpose of the attached

> application and the appropriateness of its submission to the Commission. Accordingly, it is respectfully requested that the application for transfer and the enclosed application for assignment be granted simultaneously."

The Georgia bankruptcy counsel, author of said opinion letter, is none other than Murphy. The collaborators are now apprehensive -- if they could not by conversion convince the FCC into removing Plaintiff Whitehorn's "Private Rights," *i.e.*, the FCC licenses, there would be no money for the connivers. Murphy, addressed the letter to Freret (a calculated move). However, Freret did not prepare an appendix to said application, simply provided Murphy's letter of deceit as an appendix to the FCC as part of the application. Murphy admits in the first paragraph that the confirmed Plan of Reorganization of the purchase of 100 percent of WFDR's stock by Provident was subject to the approval of the FCC. (**Murphy did not mention Plaintiff Whitehorn would be issued certificates of interest**, allowing Plaintiff Whitehorn to retain his "Private Rights" in said licenses *supra*.)

Murphy's letter filed as part of the application continues in paragraph 2.

> I understand that the Commission's staff has inquired as to how WFDR, Inc., the corporation whose stock is being purchased by Provident will reobtain title to the assets which it owned prior to the institution of the bankruptcy proceeding, and now held by "WFDR, Inc., Debtor-in-Possession". Pursuant to the terms of the Plan and by statute, the Court's Order Confirming Plan will accomplish this automatically upon FCC approval of Provident's purchase of control of WFDR, Inc. Bankruptcy

> Code §1141(b), 11 U.S.C. §1141(b) provides that "the confirmation of the Plan vests all of the property of the estate in the Debtor". In essence, then, at the same time that Provident purchases the stock of WFDR, Inc. pursuant to the Plan of Reorganization, the Debtor-in-Possession will dissolve, and WFDR, Inc. will thereupon own the corporate assets. The transfer of control of WFDR, Inc. to Provident and the vesting of assets in WFDR, Inc. will thus be simultaneous.

This paragraph discusses the Commission's concern about the debtor's property and estate property. The said property, pursuant to ownership, should have been of no concern to the FCC as set out *supra*; *In re D. H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bkrtcy 1983).

Murphy's letter and part of said application continues at paragraph 3.

> While both transfer of control and revesting of assets by assignment will result from the same transaction (i.e., Provident's stock purchase), they can be regarded as a two-step process, **if the FCC must separately approve both the assignment and the transfer of control. For this purpose, WFDR, Inc., Debtor-in-Possession, will assign its rights as licensee of stations WFDR and WFDR-FM to WFDR, Inc.** pursuant to the Order Confirming Plan thereby reversing the process which the FCC approved on June 19, 1980 (BAL-800527HW, BALH-800527HV). Then Provident will purchase the stock of the licensee, as requested in the transfer of control application filed with the FCC on April 28, 1981 (BRC810428HV, BTC-

> 810428HW). The owner of the stock of WFDR, Inc. will then, of course, also have control of the assets. (Emphasis added.)

The writing persists the transfer of control and revesting of assets by assignment has something to do with the "Private Right, Item of Value," *i.e.*, FCC licenses. The statement "**If the FCC must separately approve both the assignment and the transfer of control**" bears out Plaintiff Whitehorn's impression that the transfer of control could not be acted on until the licenses were returned to WFDR, Inc. (*i.e.*, out of bankruptcy jurisdiction) and Plaintiff Jack Whitehorn 100 percent owner of "Private Right, Item of Value," the FCC licenses.

Murphy, for the purpose of getting her hands on over $200,000 of the WFDR assets sale money, commits the following fraud:

> "For this purpose, WFDR, Inc., debtor-in-possession, will assign its rights as licensee of Stations WFDR and WFDR-FM to WFDR, Inc. pursuant to the **order confirming plan** thereby reversing the process which the FCC approved on June 19, 1980 (BAL-800527HW, BALH-800527HV). Then Provident will purchase the stock of the licensee, as requested in the transfer of control application filed with the FCC on April 28, 1981 (BTC810428HV, BTC 810428HW)."

A court has held: only the Commission can determine validity of a transfer of license to operate radio broadcasting facility and state courts (in this case, bankruptcy court), are without jurisdiction in that respect, but the Commission's jurisdiction is limited merely to control of license and there can be a separation of license from the facility which license gives one the privilege of

operating; *Big League Broadcasting Co., Inc. v. Shedd-Agard Broadcasting, Inc.* La. App. 1975, 313 So. 2d 247. (Emphasis added.)

The conspirators act on their own to assign WFDR, Inc., debtor-in-possession back to WFDR, Inc. **The order confirming plan** does not mention reversing the June 19, 1980 assignment.

In fact, the said order entered on June 29, 1981 sets out on page 5, item 14:

> "That confirmation of the Plan will be followed by the liquidation of the debtor as provided under the Plan pursuant to 11 U.S.C. § 1123(b)(4)"

The FCC acquiesced and, as the best that Plaintiff Whitehorn can determine, granted assignment of WFDR, Inc., debtor-in-possession, to WFDR, Inc. The FCC must be held accountable to the plaintiff for their conspiracy in defrauding the plaintiff. The FCC must find not merely the ultimate facts but also the basic or underlying facts. See *Saginaw Broadcasting Co. v. FCC*, 68 App. D.C. 282, 96 F.2d 554, cert. denied 305 U.S. 613, 83 L.Ed. 391, 59 S.Ct. 72. Further, deliberate misrepresentations may, by themselves, justify denial of an application for a broadcasting license; see *Crowder v. FCC*, U.S. App. D.C. 399 F.2d 569 (1968).

Further, the FCC may refuse to renew a broadcast license where there has been willful and knowing misrepresentation or lack or candor on the part of licensee in dealing with the Commission; *Leflore Broadcasting Co., Inc. v. FCC*, 1980, 636 F 2d 454, 204 U.S. App. D.C. 182.

One who takes property in such a way acquires no "title" to it. The ownership of property, whether the property be real or

personal, carries with it the right to exclude others from its possession, use, or enjoyment. The right of ownership is a right guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT 3. LACK OF AUTHORITY FOR ASSIGNMENT/ TRANSFER OF FCC LICENSES, SOUNDING IN TORT

The FCC advised Plaintiff Whitehorn, by letter dated August 14, 1981 (on file in Defendant FCC's records), that the FCC acknowledged receipt of Plaintiff Whitehorn's request for denial or deferral of action on said assignment/transfer and that Plaintiff Whitehorn had not made a timely appearance requesting said denial or deferral. (Plaintiff was not privy to any FCC action pertaining to his "Private Rights," *supra.*) Moreover, the FCC acknowledges that Plaintiff Whitehorn advised the Commission that any transfer would be "an unauthorized transfer of control."

The said letter further sets out:

> "Concerning your claims of ownership over WFDR, Inc., we note that the bankruptcy court expressly rejected your arguments in ordering that the property of WFDR, Inc. be sold to Provident. Furthermore, you have not obtained an injunction from a court with authority to enjoin the sale of the stations. Under such circumstances, the Commission will not defer action on **assignment or transfer applications** pending final resolution of disputed claims. The Commission has neither the jurisdiction nor the machinery to adjudicate claims of the nature alleged by you. Such claims must be settled privately or in a court of competent jurisdiction using local law." (Emphasis added.)

The FCC confirmed Plaintiff Whitehorn's insistent disclosure of the facts surrounding the matter. Moreover, the FCC verified there were two applications pending, *i.e.*, one application for assignment, one application for transfer.

Robert M. Garstin as discussed *supra*, was an agent for Dr. John F. Whitehorn, plaintiff's blood brother. Garstin, at all times while appearing before the FCC, knew that Plaintiff Whitehorn was actually the 100 percent owner of the "Private Rights, Items of Value." Garstin was paid directly by Dr. John Whitehorn, not WFDR, Inc.

Dr. Whitehorn nor Garstin made an appearance before the FCC until the "taking" process began. Further, Garstin attested to the FCC he was the sole director of the corporation. However, Dr. Whitehorn testified, under oath on July 30, 1981, that there were always three directors of WFDR, Inc.

Dr. Whitehorn withdrew his support from the corporation in December 1980. Garstin removed himself from the corporate property in June 1981 (moved out-of-stat

Plaintiff Whitehorn believes [illegible] Murphy and Garstin petitioned the corporate bankruptcy court for Garstin to be designated as an officer to sign papers on behalf of WFDR, Inc., debtor-in-possession, until the case was closed. The said petition was filed with the court after Garstin left the state. Plaintiff believes an order covering said designation was entered.

There is no question -- Garstin was not authorized by Plaintiff Whitehorn to represent him or WFDR, Inc. before the Federal Communications Commission.

The application for assignment from WFDR, Inc., debtor-in-possession, to WFDR, Inc. (File Nos. BAL 810716HP and BALH 810716HQ) filed on July 16, 1981 was signed by Garstin for debtor-in-possession as well as WFDR, Inc. This act was after Garstin had left the property and left the state. He may have legally signed FCC documents on behalf of the debtor-in-possession, but certainly not for WFDR, Inc. Plaintiff Whitehorn was the owner of all private beneficial rights, all value of licenses.

Plaintiff Whitehorn has paid for many hours of research into the FCC files, including but not limited to the National Archives and Records.

The said investigation has produced no FCC Form 732 or any other FCC written document consenting to said assignment from WFDR, Inc., debtor-in-possession to WFDR, Inc. However, a letter from an attorney for Provident Broadcasting Company to the Secretary of the FCC dated August 19, 1981, copies to Freret and Freret's cohort Bedell, *supra*, sets out:

> "The assignment of the licenses of Stations WFDR and WFDR-FM, Manchester, Georgia from WFDR, Inc., debtor-in-possession, to WFDR, Inc. (File Nos. BAL-810716HP and BALH-810716HQ) and the simultaneous transfer of control of WFDR, Inc. to Provident Broadcasting Company (File Nos. BTC-810428HW and BTCH-810428HV) have been consummated effective 12:01 a.m., August 18, 1981." (On file in Defendant FCC's records.)

There is absolutely no trace of any application or FCC action to transfer control of WFDR, Inc. to any party or entity. A holder wishing to transfer, assign or dispose of the permit or license

in any manner must make application to the FCC, 47 USCS § 310(d); FCC Rules § 72:457.

Certainly Garstin, as designated officer by the court for the debtor-in-possession, cannot assign or transfer for WFDR, Inc. There is no authority available for Garstin to act to assign/transfer Plaintiff Whitehorn's Private Right, Item of Value, the said licenses. Pursuant to 47 CFR § 1.23(b), when a person acting in a representative capacity appears in person or signs a paper in practice before the FCC, his personal appearance or signature constitutes a representation that he is authorized and qualified to represent the particular party in whose behalf he acts. Further under 47 CFR § 1.22 any person transacting business with the FCC in a representative capacity may be required to show his authority to act in such capacity and finally, the FCC is not precluded by any signature or appearance from making investigation into the appearance. See *Independent Music Broadcasters, Inc.*, 1978 68 FCC 2d 1412.

It is impossible to transfer control of WFDR, Inc. to Provident Broadcasting Company under Application File Nos. BTC-810428HW and BRCH-810428HV as application seeks transfer from WFDR, Inc., debtor-in-possession, to Provident Broadcasting Company.

It appears after WFDR, Inc., debtor-in-possession, was assigned to WFDR, Inc., an FCC staff member transferred, pursuant to the first application filed April 28, 1981, WFDR, Inc., debtor-in-possession, to Provident Broadcasting Company. (On file in Defendant FCC records.)

The tortious consequences of the FCC's action in this instant case is unfortunate. However, it was Plaintiff Whitehorn who notified the FCC of possible ownership problems. The

Commission, having been alerted to problem of corporate control, had the duty to explore any related matter which might bear upon public interest, whether or not urged by parties seeking and opposing modification of permit. See *L. B. Wilson, Inc. v. FCC*, 1968, 397 F.2d 717, 130 U.S. App. D.C. 156.

Applications for transfer of radio station license should be disposed of as if transferee were making application for licenses under Section 308 of Title 47 covering new applications and modifications or renewals; see *Citizens Committee v. FCC*, (1970) 436 F.2d 236, 141 U.S. App. D.C. 109.

The entire matter was not consistent with the Communications Act. The FCC may have erred in attaching greater weight to the parties who are lawyers, simply because they are lawyers, than to Plaintiff Whitehorn. See *Faulkner Radio, Inc. v. FCC*, 1977, 557 F 2d 866, 186 U.S. App. D.C. 243.

The standard of action established by Title 47 § 307 is that public interest, convenience, and necessity must be served, and within that framework the Commission is free to exercise its expert judgment, but it cannot act unconstitutionally, arbitrarily or capriciously, and it must proceed within the scope of authority granted to it; *WOKO, Inc. v. FCC*, 1945, 153 F 2d 623, 80 U.S. App. D.C. 333, reversed on other grounds 91 L.Ed. 204, 67 S.Ct. 213, 329 U.S. 223.

COUNT 4. PREVENTION OF PLAINTIFF'S CONSTITUTIONAL DUE PROCESS

Defendant Federal Communications Commission, without any doubt, constituted an interference with plaintiff's Constitutional Rights in that the final order set forth the following:

> "Jack Whitehorn IS WARNED not to file further pleadings against WFDR(AM) and WVFJ-FM, Manchester, Georgia, that may be deemed an abuse process."

The only option for this plaintiff to proceed for any type relief pursuant to the defendant's odious directive is to seek relief pursuant to this instant complaint.

WHEREFORE, plaintiff prays for:

(A) Judgment against defendant for compensatory damages in the amount of Twenty Million Dollars ($20,000,000.00);
(B) Judgment against defendant for plaintiff's reasonable attorney fees;
(C) Cost of this action to be cast with the defendant;
(D) Trial by jury;
(E) Such other relief as a court of competent jurisdiction may deem proper and just.

Respectfully submitted this 11th day of May 2001

Jack Whitehorn
Appearing *pro se*
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Las Vegas, Nevada 89118-1586
Telephone: 702-367-2102
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Federal Communications Commission
Washington, D.C. 20554

August 10, 2000
In reply refer to: 1 800B3-HM

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In re: WFDR(AM) and WVFJ-FM, (formerly WFDR-FM)
Manchester, Georgia

Dear Messrs. Whitehorn and Kravetz:

This concerns a "Petition for Revocation of License" filed by Jack Whitehorn ("Whitehorn"). Whitehorn seeks to have the Commission set aside the grant of the applications for transfer of control of WFDR, Inc., licensee of stations WFDR(AM) and WVFJ-FM, Manchester, Georgia (BTC-810428HV and BTCH81 0428HW) from WFDR, Inc., Debtor-in-Possession, to Provident Broadcasting Company.

This case has a long and arduous history. The grant that Whitehorn seeks to set aside occurred in 1981. The petition is a redated copy of a pleading initially filed by Whitehorn on August 17, 1992. After reviewing the petition and related material, the initial petition was dismissed by the Audio Services Division which relied on a bankruptcy court ruling that extinguished Whitehorn's interests in the radio stations. *Letter to Jack Whitehorn,* Ref. No. 8910-DEB

(Audio Services Division, April 6, 1994)[1]. Whitehorn attempted to appeal the staff decision directly to the United States Court of Appeals for the District of Columbia. However, the Court dismissed Whitehorn's appeal for failure to satisfy the procedural requirement of seeking review by the full Commission, by filing an application for review, before seeking court action. 47 U.S.C. § 155(c) (7). In an attempt to cure the procedural defect, Whitehorn subsequently flied an application for review which was dismissed as untimely. *Jack Whitehorn,* 10 FCC Rcd 8213 *(1995).* The Court granted the Commission's motion for summary affirmance of that dismissal while noting that, "The merits of the parties' positions are so clear as to warrant summary action." *Jack Whitehorn v. FCC,* 1996 WL 393473 (D.C. Cir. 1996). Rather than file a timely appeal of the summary affirmance with the Court, Whitehorn filed the redated and repetitious petition with us.

We will no longer consider Whitehorn's ownership claims to the stations and challenges to the transfer of control to Provident which have consistently been rejected by the courts and the Commission, culminating in the final action of the Court in granting the Commission's motion for summary affirmance. In view of the long and protracted history of repetitious filings by Whitehorn recited above, we warn Whitehorn against filing any future pleadings concerning stations WFDR(AM) and WVFJ-FM, that may be deemed an abuse of the Commission's processes. *See Alexander Broadcasting Co.,* 13 FCC Rcd *10355* (1998);

United Church of Christ V. FCC, 359 F.2d 994 (1996).

Accordingly, IT IS ORDERED that the Petition for Revocation of License filed by Jack Whitehorn IS DISMISSED as repetitious and

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[1] The Commission's Enforcement Division also dismissed Whitehorn's "Petition for Revocation of License." *Letter to Jack Whitehorn,* Ref. No. 800C1-MGK (Enforcement Division, August 17, 1994).

Jack Whitehorn IS WARNED not to file further pleadings against WFDR(AM) and WVFJ-FM, Manchester, Georgia, that may be deemed an abuse of process.

Sincerely,

Linda Blair/Chief
Audio Services Division
Mass Media Bureau

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit
Jack Whitehorn,
Appellant

v.

Federal Communications Commission,
Appellee

BEFORE: Edwards, Chief Judge;
Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of the motion to dismiss and the response thereto, It is

ORDERED that the motion to dismiss be granted. Appellant did not seek review by the full Commission of the August 10, 2000 letter in which the Chief of the Audio Services Division of the Federal Communications Commission's Mass Media Bureau dismissed appellant's "Petition for Revocation of License." Review by the full Commission is a prerequisite to seeking judicial review. *See* 47 U.S.C. § 155(c)(7) ("The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection.").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc, See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 00-1398 September Term, 2000

Jack Whitehorn,
Appellant

v.

Federal Communications Commission,
Appellee

BEFORE: Edwards, Chief Judge;
Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed January 12, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: Robert A. Bonner
Deputy Clerk